



SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-94038; File No. SR-NASDAQ-2021-040]

Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Change, as Modified by Amendment No. 1, to Establish the “Extended Trading Close” and Related Order Types

January 24, 2022.

I. Introduction

On July 12, 2021, The Nasdaq Stock Market LLC (“Nasdaq” or “Exchange”) filed with the Securities and Exchange Commission (“Commission”), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹ and Rule 19b-4 thereunder,² a proposed rule change to add Equity 4, Rule (“Rule”) 4755 and amend Rules 4702 and 4703 to establish the “Extended Trading Close,” as well as the “ETC Eligible LOC” and “Extended Trading Close” order types. The proposed rule change was published for comment in the Federal Register on July 28, 2021.³ On September 9, 2021, pursuant to Section 19(b)(2) of the Act,⁴ the Commission designated a longer period within which to approve the proposed rule change, disapprove the proposed rule change, or institute proceedings to determine whether to disapprove the proposed rule change.⁵ On October 25, 2021, the Exchange filed Amendment No. 1 to the proposed rule change, which amended and superseded the proposed rule change as originally filed.⁶ On October 26, 2021, the

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ See Securities Exchange Act Release No. 92466 (July 22, 2021), 86 FR 40667. The comment letters received on the proposed rule change are available on the Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2021-040/srnasdaq2021040.htm>.

⁴ 15 U.S.C. 78s(b)(2).

⁵ See Securities Exchange Act Release No. 92905, 86 FR 51390 (September 15, 2021).

⁶ In Amendment No. 1, the Exchange modified the scenarios in which executions in the Extended Trading Close would be suspended, and made conforming and clarifying changes throughout the proposed rule change. Amendment No. 1 is available on the

Commission published notice of Amendment No. 1 and instituted proceedings pursuant to Section 19(b)(2)(B) of the Act⁷ to determine whether to approve or disapprove the proposed rule change, as modified by Amendment No. 1.⁸ This order approves the proposed rule change, as modified by Amendment No. 1.

II. Description of the Proposal

The Exchange proposes to adopt the Extended Trading Close (“ETC”), which would be a process during which eligible orders in Nasdaq-listed securities may match and execute at the Nasdaq official closing price (“NOCP”), as determined by the Nasdaq closing cross or the LULD closing cross (together, the “Closing Cross”), for a five-minute period immediately following the Closing Cross.⁹

As proposed, only “ETC Orders” and “ETC Eligible LOC Orders” (together, “ETC Eligible Orders”) would be eligible to participate in the ETC.¹⁰ An ETC Order would be a new order type for Nasdaq-listed securities that may be executed only during the ETC and only at the NOCP as determined by the Closing Cross.¹¹ An ETC Order may be entered, cancelled, or

Commission’s website at: <https://www.sec.gov/comments/sr-nasdaq-2021-040/srnasdaq2021040.htm>.

⁷ 15 U.S.C. 78s(b)(2)(B).

⁸ See Securities Exchange Act Release No. 93428, 86 FR 60318 (November 1, 2021).

⁹ See proposed Rule 4755(a)(5).

¹⁰ ETC Orders and ETC Eligible LOC Orders may only execute against other ETC Orders and ETC Eligible LOC Orders. See proposed Rules 4702(b)(17)(A) and 4702(b)(12)(A).

¹¹ See proposed Rule 4702(b)(17)(A). An ETC Order may be assigned a minimum quantity order attribute, and the minimum quantity condition may be satisfied only by execution against one or more orders, each of which must have a size that satisfies the minimum quantity condition. See proposed Rule 4702(b)(17)(B). See also Amendment No. 1 at 13-14 n.18. If no orders in the ETC satisfy a minimum quantity condition for an ETC Order, then the ETC Order with a minimum quantity condition would rest on the Nasdaq book in time priority unless and until there is an order that can satisfy the minimum quantity condition to allow for execution of the ETC Order; if no such order is present in the ETC at its conclusion, then the ETC Order would cancel. See proposed Rule 4702(b)(17)(B). Moreover, an ETC Order may be referred to as having a time-in-force of “ETC.” See proposed Rule 4703(a)(8).

modified between the time when the ETC commences and ends.¹² If an ETC Order is not fully executed at the conclusion of the ETC, then any unexecuted portion of the order would be cancelled.¹³ An ETC Eligible LOC Order would be a LOC order for a Nasdaq-listed security entered through RASH or FIX that did not fully execute during the Closing Cross, and would participate in the ETC if the NOCP, as determined by the Closing Cross, is at or within its limit price.¹⁴ A participant may choose to disable a LOC order from participating in the ETC, in which case the system would cancel any shares of the LOC order that remain unexecuted after the Closing Cross.¹⁵ In addition, if a participant enters a time-in-force that continues after the time of the Closing Cross for a LOC order (i.e., closing cross/extended hours order), then such order would bypass the ETC.¹⁶ Any unexecuted portion of an ETC Eligible LOC Order may be cancelled or modified by the participant at any time during the ETC, and any unexecuted portion of an ETC Eligible LOC Order at the conclusion of the ETC would be cancelled.¹⁷

As proposed, the ETC would commence upon the conclusion of the Closing Cross and end at 4:05 p.m. (or 1:05 p.m. on a day when the Exchange closes early).¹⁸ The system would

¹² The system would reject an ETC Order that is submitted prior to the commencement of the ETC. See proposed Rule 4702(b)(17)(A). In addition, the system would not accept an ETC Order entered on any day when insufficient interest exists in the system to conduct a Closing Cross for that security, or when the Exchange invokes contingency procedures due to a disruption that prevents the execution of the Closing Cross. See id.

¹³ See id.

¹⁴ See proposed Rule 4702(b)(12)(A). The Exchange also proposes to amend Rule 4702(b)(12) to describe the participation of LOC orders in the LULD closing cross.

¹⁵ See id. Post-only orders, midpoint peg post-only orders, supplemental orders, and market maker peg orders may not operate as ETC Eligible LOC Orders, and ETC Eligible LOC Orders would be rejected if they are assigned a pegging attribute. See Amendment No. 1 at 9 n.14.

¹⁶ See proposed Rule 4702(b)(12)(B).

¹⁷ See proposed Rule 4702(b)(12)(A).

¹⁸ As proposed, the ETC would not occur for a security on any day when insufficient interest exists in the Exchange system to conduct the Closing Cross for that security or when the Exchange invokes contingency procedures due to a disruption that prevents the execution of the Closing Cross. See proposed Rule 4755(b). Moreover, the Exchange would cancel executions in a security that occur in the ETC if the Exchange nullifies the

match and execute ETC Eligible Orders continuously throughout the ETC, in time priority order based on the time the system received each order into the ETC,¹⁹ and at the NOCP as determined by the Closing Cross.²⁰ If fewer than all shares of ETC Eligible Orders are executed by the conclusion of the ETC, then the system would cancel any unexecuted portions of such orders.²¹

Also as proposed, beginning at 4:00:05 p.m. (or 1:00:05 p.m. on a day when the Exchange closes early), the Exchange would disseminate by electronic means an ETC order imbalance indicator every 5 seconds until the ETC concludes.²² The ETC order imbalance indicator would disseminate the following information: (a) symbol; (b) the number of shares of ETC Eligible Orders that have been matched and executed at the NOCP during the ETC, as of the time of dissemination of the ETC order imbalance indicator; (c) the size of any ETC

Closing Cross in that security pursuant to the rules governing clearly erroneous transactions. See id. The Exchange also states that if short sale orders in securities subject to Regulation SHO are permitted to execute in the Closing Cross pursuant to Rule 201 of Regulation SHO, then the system would also permit short sale executions in such securities to occur in the ETC; whereas the system would reject short sale orders in securities if short sale orders in such securities were not permitted to execute in the Closing Cross. See Amendment No. 1 at 8 n.11. Moreover, the restrictions of Rule 201 of Regulation SHO will apply to the ETC to the extent that the current national best bid is being calculated, collected, and disseminated for securities. See id.

¹⁹ ETC Eligible LOC Orders would receive new timestamps upon entry into the ETC and be prioritized amongst each other and ETC Orders based on the time the system received each order into the ETC. See Amendment No. 1 at 9. Specifically, the system would submit ETC Eligible LOC Orders for participation in the ETC, and would assign them new timestamps, in random order. See id. at 9 n.15. Therefore, ETC Eligible LOC Orders may not necessarily enter the ETC with the same relative priority that they had prior to the ETC. See id. Moreover, due to the time required for the system to process ETC Eligible LOC Orders for participation in the ETC, it is possible that an ETC Eligible LOC Order would enter the ETC with a lower time priority than an ETC Order entered after the Closing Cross concludes. See id.

²⁰ See proposed Rule 4755(b)(2). All ETC Eligible Orders executed in the ETC would be trade reported anonymously and disseminated via the consolidated tape. See proposed Rule 4755(b)(5).

²¹ See proposed Rule 4755(b)(4).

²² See proposed Rule 4755(b)(1).

imbalance²³ (exclusive of orders with minimum quantity instructions); and (d) the buy or sell direction of any ETC imbalance.²⁴

Moreover, as proposed, the Exchange system would suspend execution of ETC Eligible Orders in a security whenever it detects: (i) an order in that same security resting on the Nasdaq continuous book in after-hours trading²⁵ with a bid (offer) price that is higher than (lower than) the NOCP for that security, as determined by the Closing Cross; or (ii) the after-hours trading last sale price, or the best after-hours trading bid (offer) price, of the security other than on the Nasdaq continuous book is either more than 0.5% or \$0.01 higher than (lower than) the NOCP for that security as determined by the Closing Cross, whichever is greater.²⁶ The system would resume execution of ETC Eligible Orders in a security in scenario (i) if and when the system determines, during the ETC, that the Nasdaq continuous book in after-hours trading is clear of resting orders in that security with a bid (offer) price that is higher than (lower than) the NOCP for that security, as determined by the Closing Cross.²⁷ The system would resume execution of ETC Eligible Orders in a security in scenario (ii) if and when the after-hours trading last sale price or the best after-hours trading bid (offer) price of the security (other than on the Nasdaq continuous book) returns to within the greater of the 0.5% or \$0.01 thresholds during the ETC.²⁸ If execution of ETC Eligible Orders remains suspended as of the conclusion of the ETC, then the system would cancel any remaining unexecuted ETC Eligible Orders in that security.²⁹

²³ ETC imbalance would mean the number of shares of buy or sell ETC Eligible Orders that have not been matched during the ETC. See proposed Rule 4755(a)(4).

²⁴ See proposed Rule 4755(a)(8).

²⁵ See proposed Rule 4755(a)(1) (defining “after hours trading”).

²⁶ See proposed Rule 4755(b)(3).

²⁷ See id.

²⁸ See id.

²⁹ See id.

The Exchange represents that it will surveil the ETC for any unfair or manipulative trading practices.³⁰

III. Discussion and Commission Findings

The Commission finds that the proposed rule change, as modified by Amendment No. 1, is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange.³¹ In particular, the Commission finds that the proposed rule change is consistent with Section 6(b)(5) of the Act,³² which requires, among other things, that the rules of a national securities exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system and, in general, to protect investors and the public interest, and that the rules are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers; and Section 6(b)(8) of the Act,³³ which requires that the rules of a national securities exchange not impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The Commission believes that the ETC would provide an additional opportunity for Exchange participants to trade Nasdaq-listed securities at the NOCP on the Exchange, and would provide an alternative to the mechanisms currently available on other venues that allow customers to execute orders at the Closing Cross price after the Closing Cross concludes.

³⁰ See Amendment No. 1 at 19.

³¹ In approving this proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. See 15 U.S.C. 78c(f).

³² 15 U.S.C. 78f(b)(5).

³³ 15 U.S.C. 78f(b)(8).

The Commission received a comment letter opposing the proposal.³⁴ This commenter states that the Exchange has not effectively identified the purpose, use case, or client demand for the ETC.³⁵ This commenter also does not believe that the ETC would enhance the Closing Cross process, or improve price discovery or liquidity in the Closing Cross.³⁶ Rather, this commenter believes that the ETC could detract from the Closing Cross because some market participants would withhold their interest from the Closing Cross and refrain from submitting orders until they know the NOCP.³⁷ This, according to the commenter, would detract from the robustness and quality of the closing price.³⁸ Moreover, this commenter states that the availability of information going into the closing auction becomes the principal driver of price discovery in the continuous market in the last five to ten minutes of trading.³⁹ According to the commenter, if participants do not submit their true interest in hopes they could trade in greater size utilizing the ETC, the breadth and quality of market information could be affected and result in more uncertainty and volatility in continuous trading behavior leading into the close.⁴⁰

³⁴ See letter from Mehmet Kinak, Global Head of Systematic Trading & Market Structure and Jonathan Siegel, Senior Legal Counsel – Legislative & Regulatory Affairs, T. Rowe Price, to Vanessa Countryman, Secretary, Commission, dated August 18, 2021 (“T. Rowe Letter”).

³⁵ See id. at 1.

³⁶ See id. This commenter also distinguishes the ETC from off-exchange trading venues’ mechanisms that allow their participants to receive the NOCP, and states that these other mechanisms are pre-arranged matched trades or guaranteed close trades that (unlike the ETC) are received prior to the Closing Cross and the determination of the closing price. See id. at 2. This commenter also states that when a trade is sent to an off-exchange mechanism after the Closing Cross, it is generally a trade that is executed by a broker in a principal capacity, and these transactions tend to be “clean-up” trades for orders that did not complete in the auction or trades to facilitate other specific needs of a client. See id. The commenter believes that these existing clean-up and facilitation mechanisms generally work well and does not believe there is a void that the Exchange needs to fill in this regard. See id.

³⁷ See id. at 1-2.

³⁸ See id. at 2. This commenter also expresses the concern that Commission approval of the ETC might encourage others to offer similar functions that would likely further detract from participation and price discovery in the closing auction. See id.

³⁹ See id. at 3.

⁴⁰ See id.

In its response letter, the Exchange disagrees with the commenter's concerns that the ETC would threaten the integrity of the Closing Cross.⁴¹ The Exchange reiterates that the ETC would compete with other venues that already offer mechanisms that enable their customers to execute orders at the Closing Cross price after the Closing Cross concludes.⁴² The Exchange also does not believe that the ETC would siphon orders away from the Closing Cross.⁴³ According to the Exchange, the Closing Cross is robust, efficient, and affords its participants reasonable assurance that their orders will execute, and the published indicative price and order imbalance information prior to the commencement of the Closing Cross enable its participants to mitigate their risks of participating in the Closing Cross.⁴⁴ The Exchange believes that the ETC should not significantly alter the behavior of participants for which execution assurance is important,⁴⁵ and that the ETC could bolster participants' willingness to participate in the Closing Cross because the ETC would provide an added opportunity for their LOC orders to execute at the Closing Cross price.⁴⁶ The Exchange further states that it expects participants to use the ETC

⁴¹ See letter from Brett M. Kitt, Associate Vice President & Principal Associate General Counsel, Nasdaq, to Vanessa Countryman, Secretary, Commission, dated September 9, 2021 ("Nasdaq Response Letter").

⁴² See id. at 1-2.

⁴³ See id. at 2. The Exchange states that, to the extent that it assesses that the ETC has become too large relative to the Closing Cross, or that members are indeed utilizing the ETC as a regular substitute for the Closing Cross, then it will propose such actions as are necessary to mitigate any threat to the Closing Cross or its price discovery function. See id. at 3.

⁴⁴ See id. at 2.

⁴⁵ The Exchange also states that, for those participants that seek to execute large volumes of shares at the Closing Cross price, exclusive participation in the ETC is unlikely to meet their needs, as ETC-only orders will execute only to the extent that sufficient matching share volume exists in the ETC. See id. According to the Exchange, because it would disseminate ETC imbalance information only after the ETC commences, participants in the ETC would have less assurance about the outcome of their participation than when they participate in the Closing Cross, or in the Closing Cross and ETC together. See id.

⁴⁶ See id.

as a “clean-up” mechanism for executing orders that are not executed in the Closing Cross or to facilitate other specific client needs.⁴⁷

The Commission believes that the ETC would provide Exchange participants an opportunity to trade Nasdaq-listed securities at the NOCP on the Exchange after the Closing Cross. Specifically, Exchange participants that submitted LOC orders for the Closing Cross but did not receive a full execution for those orders could choose to allow the remaining shares to participate in the ETC. In addition, Exchange participants that did not participate in the Closing Cross but want to trade at the NOCP could submit ETC Orders to participate in the ETC. The Commission further believes that the ETC would provide an alternative to the mechanisms currently available on other venues that allow customers to execute orders at the Closing Cross price after the Closing Cross concludes.

With respect to the commenter’s concern that the ETC would cause Exchange participants to withhold their interest from the Closing Cross and negatively impact the Closing Cross process, the Commission believes that participants that currently seek to trade at the NOCP in the Closing Cross (and particularly those that seek to trade larger orders) are unlikely to significantly reduce their participation in the Closing Cross and rely instead on the ETC, because there is less assurance that their orders would receive executions in the ETC as compared to the Closing Cross. In particular, ETC Eligible Orders would trade only to the extent that there are available contra-side ETC Eligible Orders, and while the Exchange would disseminate imbalance information for the ETC, unlike the Closing Cross, such imbalance information would not be disseminated before the commencement of the ETC. The Commission also notes that, in response to this concern expressed by the commenter, the Exchange represented that, if it assesses that the ETC has become too large relative to the Closing Cross, or

⁴⁷ See id. The Exchange also states that market forces should determine whether the market for this service is already saturated and whether there is new room for competition. See id.

that participants are indeed utilizing the ETC as a regular substitute for the Closing Cross, then it will propose such actions as are necessary to mitigate any threat to the Closing Cross or its price discovery function.⁴⁸

The commenter also expresses concern that the ETC would allow sophisticated participants to engage in arbitrage by quickly identifying price differences between the Closing Cross price and the prevailing after-hours market price before other participants.⁴⁹ According to the commenter, these sophisticated participants could use ETC-only order types and ETC imbalance information to opportunistically submit orders to engage with other participants' ETC activity at a previously determined fixed price using the ETC and unwind risk in the after-market at prices that more accurately reflect the current value of the security.⁵⁰

In its response letter, the Exchange states that it does not share the commenter's concerns regarding arbitrage, and states that any risk that ETC participants would face harm from arbitrageurs is likely to be considerably less than the risks that market participants presently face when they trade after-hours.⁵¹ The Exchange also states that because it would suspend ETC executions if significant deviations emerge between the Closing Cross price and the after-hours market price of a security, this should limit the instances in which egregious arbitrage occurs.⁵² Finally, the Exchange reiterates that participation in the ETC is voluntary, and therefore any participant that is concerned about arbitrageurs is free to not participate in the ETC or cancel its orders in the ETC.⁵³

In Amendment No. 1, the Exchange amended the proposal such that the Exchange would suspend execution of ETC Eligible Orders in a security whenever it detects an order in that

⁴⁸ See supra note 43.

⁴⁹ See T. Rowe Letter at 3.

⁵⁰ See id.

⁵¹ See Nasdaq Response Letter at 3.

⁵² See id.

⁵³ See id.

security resting on the Nasdaq continuous book in after-hours trading with a bid (offer) price that is higher than (lower than) the NOCP for that security. The Exchange would resume executions of ETC Eligible Orders in that security if and when the system determines, during the ETC, that the Nasdaq continuous book in after-hours trading is clear of resting orders in that security with a bid (offer) price that is higher than (lower than) the NOCP. The Commission believes that this amendment responds to the commenter's concerns regarding the ability of some participants to take advantage of the differences between the NOCP and the Exchange's after-hours market price.⁵⁴ The Commission also believes that suspending execution of ETC Eligible Orders in a security when an order in the same security that is priced better than the NOCP is resting on the Nasdaq continuous book would help promote price priority on the Exchange.

As described above, the Exchange would also suspend execution of ETC Eligible Orders in a security whenever the after-hours trading last sale price, or the best after-hours trading bid (offer) price, of the security (other than on the Nasdaq continuous book) is more than 0.5% or \$0.01 higher than (lower than) the NOCP for that security, whichever is greater. The Exchange would resume executions of ETC Eligible Orders in this scenario if and when the after-hours trading last sale price or the best after-hours trading bid (offer) price of the security (other than on the Nasdaq continuous book) returns to within the greater of the 0.5% or \$0.01 thresholds during the ETC. The Commission believes that these price thresholds should help to ensure additional price protection for the ETC as compared to regular after-hours trading, because regular after-hours trading is not suspended in response to price deviations between the Exchange and away markets.

Finally, the Commission notes that participation in the ETC is voluntary, and those participants that are concerned about arbitrageurs may cancel their unexecuted ETC Eligible

⁵⁴ The Commission notes that no additional comment letters were received after the Exchange filed Amendment No. 1.

Orders or elect to not participate in the ETC. As described above, the Exchange has also represented that it will surveil the ETC for any unfair or manipulative trading practices.⁵⁵

IV. Conclusion

IT IS THEREFORE ORDERED, pursuant to Section 19(b)(2) of the Act,⁵⁶ that the proposed rule change (SR-NASDAQ-2021-040), as modified by Amendment No. 1 be, and hereby is, approved.

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.⁵⁷

J. Matthew DeLesDernier,

Assistant Secretary.

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⁵⁵ See supra note 30 and accompanying text.

⁵⁶ 15 U.S.C. 78s(b)(2).

⁵⁷ 17 CFR 200.30-3(a)(12).